No. 03-1030

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOEL CUNIGAN, MARK WILES, ASST. CHIEF WAYNE GREEN, SAM MANLEY, JOHN TELEK,

Petitioners,

v.

ALI SHAMAEIZADEH, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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COUNTERSTATEMENT OF THE CASE

The Petitioners' statement of the case is an accurate reprinting of the Sixth Circuit's rendition of the published facts. However, there are two points left out of the facts that Respondent needs to add. There are also facts alleged in the argument that are disputed.

1. The first officer on the scene, Mark Wiles, admitted that despite his claim that he recognized the smell of growing marijuana, he had never, prior to that moment when he entered the home at Millstone Drive, ever been exposed to nor sensed the smell of growing marijuana.

2. It is important to note that the United States did not choose to appeal the suppression of the items seized from Dr. Shamaeizadeh.

3. Respondent contests the statements of Petitioners that the items illegally seized were returned before the case was dismissed against him.

4. Respondent contests any assertion that Teresa Schmitt did anything other than ask the police to search the Millstone residence for a burglar.

REASONS FOR DENYING CERTIORARI

INTRODUCTION

The Petitioners file their second petition for certiorari before this Court asking this Court to reverse the Sixth Circuit for alleged errors committed on five separate subjects; two concerning consents to search, one related to

qualified immunity, one related to limitations of actions and one related to seizure of items alleged to be in plain view.

The Petitioners are asking this Court to extend Fourth Amendment consent analysis as it relates to the exigencies of automobiles to consent given to search houses, where the exigencies of mobility do not apply, or find them entitled to qualified immunity for believing they get to rely on search rules that apply to cars not homes.

Further, the Petitioners wish the Court to review a limitations argument despite the fact that the Court previously chose not to review the argument, thus making this issue decided as law of the case and final.

Lastly, the Petitioners ask the Court to declare the time it takes to find and compare two documents side by side for dissimilarities as being a period of time that is "immediate" such that they can claim a "plain view" exception to the seizure of items.

For the following reasons, none of these arguments merit the attention of this Court.

I. PETITIONERS SEEK TO EXTEND TO HOMES THE CONSENT EXCEPTIONS THAT APPLY TO AUTOMOBILES

The Petitioners have crafted an argument that says since the Fourth Amendment protections have been eroded as to automobiles, that now these exceptions should be applied to consent searches of homes.

They cite to *Florida v. Bostick*, 501 U.S. 429 (1991) and *United States v. Drayton*, 536 U.S. 194 (2002) claiming

these cases are authority for the assertions that in all matters under the Fourth Amendment, *per se* rules are inappropriate and that concerning all consent searches that we should look to the totality of the circumstances to determine if consent was given.

The Petitioners claim the Sixth Circuit ruling has created a "*per se*" rule

> . . . that requires officers to obtain additional consent for subsequent searches that are close in time and purpose and to request express consent in every circumstance to verify that implied consent exists or continues.

Respondent argues that there is nothing in the Sixth Circuit opinion that creates any rule concerning the scope of a search. The Sixth Circuit has merely stated that when officer Wiles was invited to a home to protect a woman from a burglar, he should have asked for consent to search the property of the home's occupants for criminal activity. The Sixth Circuit looked at all the facts and then applied the well-established law that says "[w]hen an official search is properly authorized – whether by consent or by the issuance of a valid warrant – the scope of the search is limited by the terms of its authorization". *Walter v. United States*, 447 U.S. 649, 656 (1980).

The Petitioners wish to expand a request for help by a lone woman in a house into consent to invite others in, who then search the property of the inhabitants without saying why or asking permission. And they claim for the Court to do otherwise is an unreasonable burdening and inhibiting of law enforcement, even though the United States attorney did not choose to appeal this ruling in the criminal prosecution phase of this case.

The Respondent would phrase the issue, should we allow burglary victims to be searched at the whim of the police, who had come to help them, without any Fourth Amendment protections remaining? In other words, when you call the police for help, are you abandoning your Fourth Amendment rights?

The Petitioners' assertion with which Respondent most disagrees is one that Petitioners claim without citation to authority. They state on page ten (10) of their petition,

> Particularity is always required for the issuance of a valid search warrant, but searches by consent are an exception to the Fourth Amendment, and need not be expressed or given "with particularity" to be valid.

A. THE SCOPE OF THE INITIAL SEARCH WAS LIMITED

The Petitioners assume in their arguments that they had, at the time of the first search, blanket permission to search the Millstone residence for all purposes, including criminal activity of the residents, and that said permission continued as each new officer arrived and each new warrantless search was conducted. Respondent believes there is only evidence that supports the assertion that the police were asked to secure Ms. Schmitt from a burglar. No other consent to search was given. Therefore, the initial assumption of the Petitioners' argument concerning continued consent is false and therefore, logically, their argument must fail.

Based on this faulty assumption, the Petitioners argue that they had the right to call in backup to search

the house, claiming, "[i]t is undisputed that Schmitt called the police and invited the police to enter the residence and perform a *thorough* search". Petition at p. 11 (emphasis added)

There is not one shred of evidence that Schmitt did more than ask the police to save her from a perceived burglar. The record will not support the claim of the Petitioners. To take this case only to find out the facts are not as represented will be a waste of the Court's time.

The Petitioners cite to a litany of cases concerning consent to search continuing through subsequent searches. Respondent's problem with this line of authority is that none deals with a set of facts where the scope of the search changes from public safety to criminal investigation.

These cases start out with the premise that the first search was for criminal behavior and that the subsequent searches were a continuation of that search. In this case, no consent was given in the context of the officer searching the house for Respondent's or a resident's criminal behavior. When the police changed from friend to foe, they had the obligation to request consent for searches of the home for criminal activity of the residents. The law is clear on this. The Sixth Circuit is correct on this issue.

II. IMPLIED CONSENT

The Petitioners argue that the Sixth Circuit opinion also ignores the idea that Schmitt gave consent to search for drugs, not by words, but implied through her actions. Implied consent is the concept of actions substituting for words. Petitioners argue Schmitt's actions were consistent with consent to continue searching. The problem with

their argument is not with Schmitt giving continued assistance. She did. But her assistance was in searching for a burglar to make her residence safe, not in searching for drugs. No logical inference can be drawn from a woman requesting assistance from a possible burglary, then helping the police look for a burglar, as consent for the police to now search her house for drugs without some mention of drugs before the search began. There was no consent to search for drugs. The opinion was proper.

III. QUALIFIED IMMUNITY

As an extension of Petitioners' argument concerning consent, they argue there was no case which put the officers on notice that for an officer to have consent to search a house for drugs after he had been called there for help requires the officer to ask for this consent. The Sixth Circuit cited to *Walter v. United States*, supra, which states specifically that the scope of the search pursuant to consent is limited by the terms of its authorization. *Id.* at 656. *Walter* was issued in 1980. Therefore, all elements are satisfied to deny qualified immunity to the Petitioners.

IV. LIMITATIONS

The Petitioners' argument on limitations is conditioned on a premised fact that is not true. For the Petitioners argument to even begin to have merit we have to assume that some of the items seized were returned to Respondent before the criminal case was dismissed. Respondent believes when the police check their logs they will see the seized items were not returned until after the indictment was dismissed.

Since this fact is not true, there are no facts upon which to make the argument that seized items returned by police prior to dismissal of criminal charges should trigger the running of limitations from some point prior to dismissal but only as to those items returned prior to dismissal.

Heck v. Humphrey, 512 U.S. 477 (1994) is being applied relatively uniformly throughout the circuits and with common sense. There is no real split in the circuits on this issue as Respondent said in his prior brief in opposition filed October 28, 1999 No. 99-562.

Lastly, since the limitations issue was raised in a previous appeal and this Court chose not to take it, it is law of the case, final, and cannot be litigated again.

V. PLAIN VIEW

The Petitioners also ask this Court to eviscerate the plain view doctrine by asking the Court to hold that the finding of two paper documents among many and then the act of comparing the writing on each, are acts that are of such short duration that it satisfies the immediately incriminating requirement of the plain view exception to the particularity requirement for seizure pursuant to warrant.

Even if the Court did rule for the Petitioners on this issue, it would provide them little relief; as there are other items illegally seized that remain held illegally seized and are not within the scope of this petition.

Lastly, there is simply no conceivable way for the time it takes to compare writing on documents to be termed immediate. The acts of studying two documents, of looking

left at one, then looking right at another, and so on until satisfied of their criminality, is not immediate in any sense of the word. There can be no plain view exception that applies to these facts. The police took items that were outside the scope of the warrant. This violates the particularity requirement and violated claimant's rights.

CONCLUSION

WHEREFORE, Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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